Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CLYDE O. WASHINGTON and AVA B. WASHINGTON,

Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LAPORTE COUNTY, MARSHALL FIELD & COMPANY, CREDITORS SERVICE OF MICHIGAN CITY, INDIANA, ORVILLE ANDERSON, JAMES PUGH, ELDON KRAUSCH, TOM NAUGHTON, RICHARD SCHAUMANN, JOHN F. HOEHNER,

Respondents.

BRIEF OF RESPONDENT JOHN F. HOEHNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether in a 42 U.S.C. §1983 action, when facing a Motion to Dismiss, a pro se plaintiff is required to show specific acts or conduct committed under color of state law by a private attorney in a state court case which resulted in deprivation of rights and privileges secured by the Constitution, before a valid claim is stated.

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OPINIONS BELOW

The opinions and orders of the lower courts, except for the United States Magistrate's Order of August 14, 1987, are attached to the Petition. The United States Magistrate's Order is included in the Respondent's Appendix section. (App. A, *infra*). None of the Orders are reported.

JURISDICTION

The jurisdictional requisites are not adequately set forth in the Petition. The Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, South Bend Division, was entered on November 22, 1988. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. §1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

STATEMENT OF THE CASE

The petitioners, Clyde O. Washington and Ava B. Washington (Washingtons), brought this action against various individuals, corporations and entities alleging essentially three (3) separate causes of action under the Civil Rights Act of 1964, 42 U.S.C. §1983.[1] The first cause of action was against First Federal Savings & Loan Association of LaPorte County, Indiana and two of its officers, Orville Anderson and James Pugh, charging them with "conspiracy, racial discrimination and retaliation" for withholding approximately Nineteen and no/100 Dollars ($19.00) in monthly private mortgage insurance payments from the proceeds of a mortgage loan made to the Washingtons. The second cause of action charged John Hoehner with malpractice, conspiracy and deprivation of due process rights in his representation of the Washingtons in a state court suit.[2] A third cause of action which involved Mar-

[1] This Brief in Opposition to the Petition for Writ of Certiorari concerns only the respondent, John F. Hoehner in his role as a private attorney. Other factual information supplied in the Statement of the Case with regards to other individuals, corporations and entities is merely for purposes of establishing continuity. Additionally, the petitioners' contention that the present matter (filed in 1983) should be consolidated with their later lawsuit (filed in 1987) which is still pending in the United States District Court for the Northern District of Indiana, South Bend Division, wherein John Hoehner is not a named party, is without merit having already been addressed by the United States Court of Appeals for the Seventh Circuit in Orders dated February 23, April 1, April 22, and May 19, 1988.

[2] Owing to the Washingtons' failure to have properly raised and preserved the question of conspiracy at the appellate level, only the issue of alleged malpractice is before the Court. As stated in *Kosak v. United States*, 465 U.S. 848, 104 S.Ct. 1519 n. 3 (1984), this Court will refrain from addressing issues not raised in the Court of Appeals.

shall Field & Company, Creditors Service of Michigan City, Eldon Krausch, Tom Naughton, and Richard Schaumann concerned a state court judgment entered against the Washingtons and subsequent liens placed against their personal and real property.

On December 23, 1981, the Washingtons called on the law offices of John Hoehner to discuss available legal alternatives resulting from an Indiana State Court judgment in favor of Marshall Field & Company and its assignee, Creditors Service of Michigan City. Judgment was entered against the Washingtons on June 12, 1980 in the LaPorte County (Indiana) state court, for failure to pay outstanding bills and charges. (R. 1, p. 2; R. 73, p. 6).[3] Up until the December 31, 1981 meeting, the Washingtons had been conducting their own defense as pro se defendants. At the meeting John Hoehner requested all relevant documents regarding credit charges incurred at Marshall Field's to aid him in his negotiations, since a Motion for Proceedings Supplemental to Execution on the Judgment was already on file in the state court. It was also pointed out to the Washingtons that the time for direct

[3] Judgment in the state court was entered in favor of Marshall Field & Company and its assignee, Creditors Service of Michigan City and against the Washingtons, who represented themselves as pro se defendants on June 12, 1980 for a long outstanding unpaid credit balance. (R. 19, Exh. B). The Washingtons did not consult with Attorney Hoehner until December 23, 1981 some one and one-half years after judgment was entered. Under applicable Indiana law, the time for appealing the LaPorte County Court judgment had long since expired. The first step in preserving rights to an appeal is to file a Motion to Correct Errors with the trial court within sixty (60) days after entry of a final judgment. Indiana Rules of Trial Procedure, Rule 59(c). *See* Brief of defendant-appellee, John F. Hoehner, Appendix A-27. This time period expired on August 12, 1980, some eighteen (18) months prior to the Washingtons meeting with John Hoehner.

legal action by an attorney was no longer feasible given the lapse of time since the date of judgment, as the Indiana Rules of Trial Procedure did not provide a mechanism for appealing the state court judgment under this given time frame.

As a result of this meeting a retainer of Three Hundred and Fifty Dollars ($350.00) was paid to John Hoehner to either negotiate and reduce the judgment balance directly with Creditors Service of Michigan City, or to negotiate and enter into an agreement whereby any outstanding interest on the principal balance would be forgiven and payment terms arrived at. (R. 69; R. 70). Negotiations then commenced.

On July 1, 1982, negotiations having failed, Creditors Service of Michigan City filed its Verified Motion on Proceedings Supplemental and the LaPorte County Court scheduled a hearing for the 11th day of August, 1982. This hearing date was later continued by the state court *sua sponte* to September 15, 1982. On July 13, 1982, John Hoehner sent a letter to the Washingtons informing them of his then recent appointment as an Assistant United States Attorney for the Northern District of Indiana, and that effective July 23, 1982, he would no longer be engaged in the private practice of law. (App. B, *infra*). In this same letter, John Hoehner recommended his brother, who was also a licensed attorney in the State of Indiana, to take over their case, but it was also stated that the Washingtons were free to retain any attorney of their choosing. The Washingtons chose neither course offered to them. As the state court docket sheet clearly shows, there was no scheduled court proceeding filed from December 10, 1981 through the time when the attorney/client relationship was terminated. (App. C, *infra*).

SUMMARY OF THE ARGUMENT

At no time during the entire pendency of this case have the Petitioners pointed to any specific events, facts, conduct or actions by John Hoehner that even hint at his having acted under color of state law during the time period he represented the Washingtons as a private attorney. The representation of a client by an attorney is a private function for which state office and authority are not required. Owing to this factor, it is well established that a private attorney does not act under color of state law for purposes of Section 1983 merely because he practices in state court.

John Hoehner provided legal services to the Petitioners stemming out of and well after a state court judgment was entered against them some eighteen (18) months prior to the parties' first meeting. At all times, this professional relationship was of a private nature. As a result, John Hoehner at no time acted under color of state law as defined by Section 1983, and the Petitioners have failed to raise any facts establishing conduct to the contrary. Thus, the Petition for Writ of Certiorari has no foundation upon which to rest, and should be denied.

ARGUMENT

I.

ONLY A CLAIM FOR ATTORNEY MALPRACTICE IS BEFORE THE COURT, AND AS A RESULT OF PLAINTIFFS' FAILURE TO SHOW THAT JOHN HOEHNER ACTED UNDER COLOR OF STATE LAW, THEIR PETITION MUST BE DENIED.

At issue is the Washingtons' claim under 42 U.S.C. §1983 that John Hoehner committed attorney malpractice and in so doing, acted under color of state law during the course of his representation as a private attorney. The preliminary inquiry in any civil rights action under Section 1983 is whether the conduct complained of was committed by a person under color of state law, and whether the conduct deprived that party of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912 (1981); *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985). Section 1983 does not create a remedy for all conduct that may result in violation of rights, privileges or immunities secured by the Constitution and laws. *Briscoe v. LaHue*, 460 U.S. 325, 327, 103 S.Ct. 1108, 1112 (1983). Congress enacted this statute to enforce rights granted under the Fourteenth Amendment which in turn applies to acts done by the state, and not those done by private parties or entities. *Civil Rights Cases*, 109 U.S. 3, 33 S.Ct. 18 (1883); *Rendell-Baker v. Kohn*, 102 S.Ct. 2764, 2770 (1982).

It is well established that representation of a client by an attorney is essentially a private function for which state office and authority are not needed, and to which the requirement of acting under color of state law will

not attach. *Polk County v. Dodson*, 454 U.S. 312, 319, 102 S.Ct. 445, 450 (1981). Privately retained attorneys do not act under color of state law for purposes of a civil rights statute merely because they practice in state court. *Miller v. Duffin*, 637 F.Supp. 496 (N.D. Ind.), *aff'd*, 812 F.2d 1410 (1986). In fact, the process of licensing attorneys as officers of a particular court does not cause a lawyer representing a client in a legal proceeding to be considered to be acting under color of state law for purposes of a Section 1983 action. *Henderson v. Fisher*, 631 F.2d 1115 (3rd Cir. 1980); *Masel v. Industrial Commission of Illinois*, 541 F.Supp. 342 (N.D. Ill. 1982).

The only logical conclusion that can be drawn is that an attorney representing a party in legal proceedings in state court cannot act under color of state law within the meaning of Section 1983. The very nature of the services provided by John Hoehner to the Washingtons points to the private nature of their relationship, and provides ample proof that at no time was he acting under color of state law. *Briscoe v. LaHue*, 460 U.S. 325, 329, n. 6, 103 S.Ct. 1108 (1983).

In their Petition, the Washingtons, as they did in their Complaint and Brief to the United States Court of Appeals for the Seventh Circuit, engage in unfocused conclusory allegations of John Hoehner's failure to represent them in the state court case. The alleged malpractice consisted of the respondents having failed to appear at three (3) court proceedings which resulted in a judgment against them. (R. 75, p. 3). Nevertheless, as shown by the LaPorte County Court docket sheet, judgment had been entered against the Washingtons on June 12, 1980. John Hoehner was not contacted by the Washingtons until December 23, 1981. A hearing date on Proceedings Supplemental to Execution on the Judgment was facing the Washingtons on

December 30, 1981. John Hoehner was able to get a continuance of this hearing so as to engage in direct negotiations with Creditors Service of Michigan City. The actual hearing date on the Verified Motion for Proceedings Supplemental did not take place until September 15, 1982, some two months after John Hoehner informed the Washingtons he could no longer represent them. Thus, during the operative time periods of his representation of the Washingtons, no court hearing of any kind was ever held that bound the Petitioners.

A party's burden of proof in a Section 1983 action must be more than self-serving unfounded conclusions brought forth by a Petitioner. Absent a showing of specific facts or conduct demonstrating that John Hoehner acted under color of state law during his representation of the Washingtons, the issue of whether the Complaint or the instant Petition alleges a Constitutional deprivation of rights need not even be addressed.

It is true that a pro se complaint must be judged by standards less stringent than if the complaint had been drafted by counsel. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652, *rehrg. denied*, 405 U.S. 948, 92 S.Ct. 963, 30 L.Ed.2d 814 (1972). The Petitioners' original Complaint was challenged by two (2) separate Motions to Dismiss filed by John Hoehner. This Court established a guide for gauging the sufficiency of a complaint in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) when it stated that a complaint should not be held insufficient to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. In the present matter, the Petition, as with all the preceding pleadings and briefs filed by the Washingtons, even liberally construed, shows only the same repetitive conclusory allega-

tions. Conclusory allegations of constitutional deprivation of rights by the Washingtons, without anything more, is not sufficient to survive John Hoehner's Motions to Dismiss. There is nothing contained in the Petition that even remotely establishes or hints at any facts which show that John Hoehner was acting under color of state law during the course of his representation. As a result, the Petition for Writ of Certiorari should be denied.

II.

THE FAILURE TO SHOW SPECIFIC ACTS BY JOHN HOEHNER DONE UNDER COLOR OF STATE LAW WITHIN THE PURVIEW OF SECTION 1983 DISPENSES WITH THE NECESSITY TO INQUIRE INTO ALLEGATIONS OF CONSTITUTIONAL DEPRIVATION UNDER THE SEVENTH AND FOURTEENTH AMENDMENTS.

The Washingtons spent a great majority of time in their Petition discussing what they perceived to be a deprivation of their rights, privileges and/or immunities guaranteed to them by the Constitution and the Indiana State Constitution. However, having failed to satisfy the requisite elements for establishing a cause of action under Section 1983 as stated in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), there is no reason for the Respondent to address the question of any alleged deprivation of rights. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For any and all of the aforegoing reasons, the Respondent respectfully moves this Court to deny the Petitioners' Writ of Certiorari.

Respectfully submitted,

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APPENDICES

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APPENDIX A

[Filed August 14, 1987]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil No. S 83-125

CLYDE O. WASHINGTON and AVA B. WASHINGTON,
Plaintiffs,

v.

MARSHALL FIELD & CO., RICHARD P. SCHAUMANN, JOHN F. HOEHNER, THOMAS NAUGHTON, FIRST FEDERAL SAVINGS & LOAN, ORVILLE ANDERSON, JAMES PUGH, ELDON KRAUSCH, and CREDITORS SERVICE OF MICHIGAN CITY, INDIANA,
Defendants.

REPORT AND RECOMMENDATION

On May 7, 1987 the district court entered an order referring this case to the undersigned Magistrate to conduct hearings and submit proposed findings of fact and recommendations for the disposition of motions pursuant to § 636(b)(1)(B) of the Federal Magistrates Act. This report is submitted and filed with the court in conformity with § 636(b)(1)(C) of said Act.

Clyde and Ava Washington originally filed this lawsuit in the South Bend Division on March 24, 1983. Their *pro se* complaint alleges various acts of racial discrimination and civil rights violations by nine parties. On December 8, 1983 the Honorable Allen Sharp entered an order assigning this case to the Honorable William C. Lee.

The allegations contained in plaintiffs' complaint create three separate and distinct claims against various defendants. Plaintiffs' first claim involves the First Federal Savings and Loan Association of LaPorte County, Orville Anderson, and James Pugh. The complaint alleges that Anderson and Pugh committed conspiracy, racial discrimination and retaliation by withholding loan proceeds previously approved by First Federal in October of 1982. At the time in question, Anderson and Pugh were employed by First Federal as acting executive vice president and vice president/loan officer, respectively.

Plaintiffs' second claim involves John Hoehner. The complaint alleges that Hoehner committed conspiracy, malpractice and denied plaintiffs' their due process rights by not representing them in an action filed in LaPorte County Court by Marshall Field and Company and Creditors Service Bureau. Plaintiffs allege that Hoehner's action caused emotional trauma and resulted in a lien being placed against their property.

Plaintiffs' third claim involves Marshall Field and Company, Eldon Krausch, Tom Naughton, Richard Schaumann, and Creditors Service Bureau of Michigan City, Indiana. On February 2, 1980 Marshall Field and Company, as assignor, and Creditors Service Bureau, as assignee, filed suit against the Washingtons in LaPorte Superior Court to collect a past due charge account balance owed by Ava Washington. The Honorable Arthur Keppen entered judgment for Marshall Field and Creditors Service Bureau on June 12, 1980 for the sum of $2,735.14. Plaintiffs' complaint alleges that Marshall Field placed a lien against their personal and real property. In addition, plaintiffs allege that Richard Schaumann, an attorney retained by Creditors Service Bureau, committed perjury under oath during trial of the charge account matter in LaPorte County.

Numerous motions to dismiss and motions for summary judgment are presently before the court. At a pre-trial conference held on November 4, 1983 the Honorable Allen Sharp ordered all motions to dismiss converted to motions

for summary judgment. Chronologically, by date of filing, the pending motions are as follows.

On April 15, 1983 Marshall Field and Company and Richard Schaumann filed a motion to dismiss. Shortly thereafter, on April 28, 1983, Tom Naughton filed a motion to dismiss. John Hoehner filed a motion to dismiss and a motion for sanctions on November 4, 1983. On December 14, 1983 First Federal Savings and Loan Association, Orville Anderson and James Pugh filed a motion for summary judgment. John Hoehner renewed his motion to dismiss and motion for sanctions on October 29, 1986.

FINDINGS OF FACT

As indicated previously, the Washingtons' complaint contains three separate claims against the nine defendants. Accordingly, the undersigned will enter proposed findings of fact for each claim.

I. *Claim Against First Federal Savings and Loan Association of LaPorte County*

First Federal Savings and Loan Association of LaPorte County ("First Federal") is a federal savings and loan corporation licensed to conduct business in LaPorte County, Indiana. The Washingtons allegedly attempted to obtain a home improvement loan from First Federal between January 1977 and March 1981. Sometime in 1981 the Washingtons filed a complaint against First Federal with the Indiana Civil Rights Commission and the United States Department of Housing and Urban Development charging First Federal with unlawful discrimination in housing on the basis of race.

On October 19, 1981 the Washingtons and First Federal entered into a Consent Agreement. (See First Federal's Motion for Summary Judgment, Exhibit B). Under the terms of the Consent Agreement First Federal agreed to make a home equity loan to the Washingtons. Specifically, paragraph seven of the Consent Agreement provides

that First Federal would make an equity loan of 80% or 90% of the appraisal value of the Washingtons' home, minus the Washingtons' present mortgage, a second mortgage held by Avco Financial Company, escrow funds for a judgment against the Washingtons in LaPorte County Court, and the balance of the closing costs. Under the Consent Agreement the Washingtons agreed to waive their right to a formal determination of the complaint by the Indiana Civil Rights Commission.

On October 30, 1981 First Federal approved a loan in the amount of $32,600.00. (See First Federal's Motion for Summary Judgment, Exhibit D). After subtracting the items referred to in paragraph seven of the Consent Agreement and various expenses incurred in connection with the loan, the net balance payable to the Washingtons amount to $23,490.16.

The gravamen of the Washingtons' complaint is that First Federal violated the terms of the Consent Agreement by imposing a $19.56 closing fee solely for First Federal's protection. However, the Loan Settlement Statement signed by the Washingtons and First Federal on October 30, 1981 makes no reference to a $19.56 closing fee. The only $19.56 charge referred to on the Loan Settlement Statement is a $19.56 monthly mortgage insurance charge.

It appears to the undersigned that the Washingtons are attempting to characterize the mortgage insurance charge as a denial of the balance of the loan proceeds. However, in his affidavit James Pugh states that First Federal maintained a loan policy which required mortgage insurance from a borrower when the loan amount exceeded 80% of the appraised value of the real estate to be mortgaged. (See First Federal's Motion for Summary Judgment, Exhibit A, paragraph 6). According to Pugh, the loan given to the Washingtons on October 31, 1987 was 90% of the appraised value of their home (Exhibit A, paragraph 5). Consequently, the undersigned concludes that First Federal did not violate the Consent Agreement or deny the

balance of loan proceeds by imposing the $19.56 monthly mortgage insurance charge. First Federal imposed the charge pursuant to a validly existing loan policy.

II. *Claim Against John Hoehner*

The factual allegations underlying the Washingtons' cause of action against John Hoehner are contained in plaintiffs' Exhibit A through G filed on May 16, 1983. As plaintiffs' Exhibit C indicates, Ava Washington sent a letter to the Indiana State Bar Association concerning Mr. Hoehner on July 24, 1982. In this letter she alleges that Hoehner promised to represent her in a dispute with Marshall Field and Company regarding a closed charge account. In this letter Ava Washington asks for the return of a retainer fee she paid to Hoehner. In addition, she enclosed a copy of a letter she received from attorney Hoehner on July 13, 1982 advising her of his appointment as Assistant United States Attorney for the Northern District of Indiana. (See plaintiffs' Exhibit B). Mr. Hoehner's letter explained that he would no longer be engaged in private practice and would transfer the Washingtons' case to his brother, a Valparaiso attorney.

The Disciplinary Commission of the Supreme Court of Indiana responded to Ava Washington's letter on July 27, 1982. (See plaintiffs' Exhibit D). The Executive Secretary of the Commission, Sheldon Breskow, advised Ava Washington that fee matters between a client and his attorney are ordinarily not grounds for disciplinary action against the attorney. He also advised Ava Washington that she could file a complaint against attorney Hoehner on an enclosed grievance form.

On August 2, 1982 Ava Washington filed a formal complaint with the Disciplinary Commission against Mr. Hoehner. (See plaintiffs' Exhibit E). In her complaint she alleges that on December 23, 1981 she met with Hoehner at his Valparaiso office to discuss the Marshall Field mat-

ter.[1] During the course of this meeting Hoehner allegedly agreed to represent Mrs. Washington for $350.00. The complaint alleges that Mrs. Washington paid Hoehner $150.00 on December 23 and paid the balance the next day. In addition, the complaint alleges that Mrs. Washington sent a variety of documents to Hoehner pertaining to the Marshall Field matter.

The Disciplinary Committee subsequently dismissed the complaint against Hoehner. In a letter dated August 5, 1982 the Acting Executive Secretary of the Commission, Thomas Opsut, advised Mrs. Washington that her complaint did not "raise a substantial question of misconduct which would warrant disciplinary action against Mr. Hoehner." (See plaintiffs' Exhibit G).

III. *Claim Against Marshall Field*

Plaintiffs' claim against Marshall Field and Company, Creditors Service Bureau, Eldon Krausch, Tom Naughton, and Richard Schaumann centers on Ava Washington's charge account with Marshall Field and Company. Mrs. Washington opened her account in July 1972 and purchased various items in 1974 under a Home Plan Agreement. Marshall Field subsequently closed the account for being past due. On January 16, 1980 Marshall Field as-

[1] The LaPorte County Court entered judgment in favor of Marshall Field and Company and Creditors Service Bureau on June 12, 1980. Mrs. Washington did not consult attorney Hoehner until December 23, 1981. It is unclear why Mrs. Washington sought attorney Hoehner's assistance in the Marshall Field matter since the time for appealing the LaPorte County judgment had expired. Under Indiana law, the first step in perfecting an appeal is filing a Motion to Correct Error with the trial court. Indiana Trial Rule 59(c) provides that a Motion to Correct Error must be filed not later than 60 days after entry of a final judgment. Therefore, if the Washingtons intended to appeal the judgment, they would have had to file a Motion to Correct Errors no later than August 12, 1981.

signed the unpaid balance of the account to Creditors Service Bureau.

On February 5, 1980 Creditors Service Bureau, as assignee, and Marshall Field and Company, as assignor filed suit against the Washingtons in LaPorte County Court to collect the unpaid balance due on the account. *Creditors Service Bureau, Assignee, Marshall Field and Company, Assignor v. Clyde Washington and Ava Washington*, Cause No. LPC-MC-80—2P-340. At trial of the matter on June 12, 1980, Ava Washington argued that she made payments on her account and did not owe the $2,800.00 alleged in the complaint. Eldon Krausch, manager of Field's charge account department testified that Mrs. Washington owed $2,618.07 on one account and $167.07 on another account. The Honorable Arthur Keppen entered judgment against the Washingtons in the sum of $2,785.14. The Washingtons apparently did not appeal this judgment to the Indiana Court of Appeals.

CONCLUSIONS OF LAW

At the outset, the undersigned acknowledges the *pro se* nature of the Washingtons' complaint. *Pro se* pleadings are to be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 592 (1972). The district court's role is to ensure that the claims of *pro se* litigants are given "fair and impartial consideration." *Matzker v. Herr*, 748 F.2d 1142, 1146 (7th Cir. 1984); *Caruth v. Pinkney*, 683 F.2d 1044, 1050 (7th Cir. 1982). The undersigned also recognizes that federal courts have historically exercised great tolerance to ensure that an impartial forum remains available to plaintiffs invoking the jurisdiction of the court without the guidance of trained counsel. *Pro se* motions and complaints such as the Washingtons' are held to less stringent pleadings requirements; rigor in the examination of such motions, complaints and pleadings is inappropriate.

Plaintiffs' original typewritten complaint is not a model of clarity. Aside from general allegations of racial discrimination and denial of due process, plaintiffs' complaint fails

to specify the particular civil rights statute under which plaintiffs' attempt to proceed. Having carefully reviewed the pleadings in this case, and liberally construing those pleadings, the undersigned interprets plaintiffs' complaint as attempting to state a cause of action under 42 U.S.C. § 1983. This conclusion is bolstered by the fact that the record in this case includes a filed but unstamped form entitled "Form To Be Used By Persons In Filing A Complaint Pro Se Under the Civil Rights Act, 42 U.S.C. § 1983."[2] After review of the record and the elements of § 1983 claims, it is the recommendation of the undersigned that all pending motions be granted and this cause be dismissed.

To establish a cause of action under § 1983[3] a plaintiff must allege, and subsequently prove, two essential elements. First, the plaintiff must allege that the defendant or defendants acted under color of state law. Second, the plaintiff must allege that the defendant or defendants deprived the plaintiff of a right, privilege, or immunity secured by the Constitution and laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912

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[2] It is unclear why this filed but unstamped form complaint is part of the court's record. Copies of the form complaint are attached to summons sent to Creditors Service Bureau, Eldon Krausch, James Pugh and Orville Anderson on December 22, 1983. In a notice dated December 20, 1983 the Clerk's office notified plaintiffs that service of process had not been accomplished to Krausch and Creditors Service Bureau. The December 22nd summons to these two defendants were apparently issued in response to this notice.

[3] Section 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

(1981), *Matzker v. Herr*, 748 F.2d 1114, 1147 (7th Cir. 1984). Section 1983 generally does not address the conduct of private individuals. *Miller v. Duffin*, 637 F.Supp. 496, 502 (N.D. Ind. 1986). Since plaintiffs' complaint names private individuals and corporations as defendants, the critical injury in the present case is whether any of the defendants acted under color of state law. In light of the undersigned's conclusion that none of the defendants acted under color of state law, the question of whether plaintiffs' complaint alleges a constitutional deprivation need not be addressed. For the sake of clarity, the undersigned will examine the allegations as to each defendant.

I. *First Federal Savings and Loan Association of LaPorte County*

As indicated, First Federal is a federal savings and loan corporation. Federal savings and loan associations are chartered pursuant to the Home Owner's Loan Act, 12 U.S.C. § 1461 et seq., by the Federal Home Loan Bank Board, an agency of the United States. *Vazquez v. Bayamon Federal Savings and Loan Association*, 506 F.Supp. 113, 115 (D. Puerto Rico 1980). As a federal rather than a state entity, First Federal's actions do not constitute state action. Consequently, First Federal did not act under color of state law and plaintiffs' claim must necessarily fail.

Even assuming, arguendo, First Federal was a state savings and loan association, the requisite state action would not exist. Although banks must be subject to state regulation, this regulation does not convert the bank's actions into state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974); *Rynearson v. First Nat'l Bank of Rochester*, 602 F.Supp. 1253, 1256 (N.D. Ind. 1985). Moreover, a state's acquiescence in a particular banking practice does not convert that practice into action taken under color of state law. *Fletcher v. Rhode Island Hospital First Nat'l Bank*, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U.S. 1001, 95 S.Ct. at 320 (1974); *Rynear-*

son, 602 F.Supp. at 1257. Therefore, even if First Federal was a state entity, the actions of First Federal, Anderson and Pugh would not have been committed under color of state law.

II. *John Hoehner*

Hoehner allegedly agreed to represent the Washingtons in their dispute with Marshall Field concerning Ava Washington's charge account. The Washingtons allege that Hoehner denied them their due process rights by failing to represent them as agreed. They also allege that Hoehner committed malpractice and conspiracy. Although Mr. Hoehner is presently employed as an Assistant United States Attorney, he was a private attorney engaged in private practice when consulted by the Washingtons.

It is well established that representation of a client by an attorney is essentially a private function for which state office and authority are not needed and to which the requirement of acting under color of state law will not attach. *See, Polk County v. Dodson*, 454 U.S. 312, 319, 102 S.Ct. 445, 450 (1981). The licensing of lawyers as officers of a particular court does not cause lawyers to be considered to be acting under color of state law for purposes of § 1983 when a lawyer represents a party in legal proceedings. *Henderson v. Fisher*, 631 F.2d 1115 (3rd Cir. 1980); *Masel v. Industrial Commission of Illinois*, 541 F.Supp. 342 (N.D.Ill. 1982). *See also, Polk County*, 454 U.S. at 318-19, 102 S.Ct. at 450; *Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S.Ct. 402, 209 (1979). An attorney representing a party in a legal proceeding, acting as that person's counsel, is not acting under color of state law within the meaning of § 1983. Such a conclusion is compelled by the character and nature of the service performed by the attorney. *Ferri*, 444 U.S. at 204, 100 S.Ct. at 409. *See also, Briscoe v. LaHoe*, 460 U.S. 325, 329, n. 6, 103 S.Ct. 1108, 1112, n. 6 (1983).

Plaintiffs' complaint, even if liberally construed, reveals nothing more than a personal dispute between an attorney

and his clients. Hoehner's actions were not taken under state law and, consequently, do not fall within the purview of § 1983. Further, allegations of malpractice by Hoehner are state law claims, not constitutional or federal claims. Although § 1983 is a tort remedy, it is a limited tort remedy. It addresses allegations of torts arising from violations of "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Section 1983 is not meant to be duplicative of state tort law remedies. *See, Johnson v. Miller*, 680 F.2d 39 (7th Cir. 1982). The malpractice allegations contained in the Washingtons' complaint are fully actionable under state law. Those malpractice allegations are not actionable under § 1983. The undersigned therefore concludes that the requisite state action is not present and the Washingtons' claim against Hoehner must be dismissed.

Plaintiffs' original complaint also attempted to allege a conspiracy by Hoehner. The only conspiracy statute under which plaintiffs can proceed is 42 U.S.C. § 1985. In order to establish a conspiracy under § 1985, a plaintiff must "allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Grimes v. Smith*, 776 F.2d 1359, 1363 (7th Cir. 1985) *citing, United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 103 S.Ct. 3352, 3356 (1983) *accord, Quiones v. Szorc*, 771 F.2d 289, 291 fn. 1 (7th Cir. 1985).

Aside from a conclusory allegation that John Hoehner "committed conspiracy" the Washingtons' complaint fails to present any facts which would support a finding of conspiracy. Consequently, the conclusory allegation of conspiracy must be dismissed. *Pfeil v. Rogers*, 757 F.2d 850 (7th Cir. 1985).

III. *Marshall Field and Company*

Plaintiffs' third claim involves Marshall Field and Company, Creditors Service Bureau, Eldon Krausch, Tom Naughton, and Richard Schaumann. Marshall Field and Creditors Service Bureau are private corporations. The remaining three defendants are private individuals.

As a general rule, private citizens and corporations do not act under color of state law and are thus not amenable to suit under § 1983. Section 1983 "does not create a remedy for all conduct that may result in violation of 'rights, privileges, or immunities secured by the Constitution and laws.' " *Briscoe v. LaHue*, 103 S.Ct. 1108, 1112 (1983). It was enacted pursuant to the authority of Congress to enforce the fourteenth amendment, *Rendell-Baker v. Kohn*, 102 S.Ct. 2764, 2770 (1982), and the fourteenth amendment applies to acts done by the state, and not those done by private parties or entities. *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18 (1883).

A private defendant acts under color of state law only if he engages in a conspiracy with state officials or is a willful participant in a joint activity with the state. *Adicke v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605 (1970); *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 281 (7th Cir. 1986). Plaintiffs' complaint contains no allegations, nor facts which could infer any allegations, of a conspiracy with the state to deny plaintiffs' constitutional rights. Therefore, it is the opinion of the undersigned magistrate that plaintiffs' complaint fails to establish the essential element of state action and should be dismissed.

In addition, the undersigned agrees with defendants' contention that the present action is nothing more than a collateral attack on the judgment entered against the Washingtons in LaPorte County Court. The mere fact that the defendants utilized the state court system to obtain a judgment against the Washingtons does not constitute state action for purposes of § 1983. The filing or pros-

ecution of an action in state court under color of state law does not cause the private person filing the action to be considered to be acting under color of state law within the meaning of § 1983. *Grow v. Fisher*, 523 F.2d 875, 879 (7th Cir. 1975). Moreover, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint action with the state. *Dennis v. Sparks*, 449 U.S. 24, 28, 101 S.Ct. 183, 186 (1980).

Even when plaintiffs' complaint is liberally construed it is clear that none of the defendants in the Marshall Field claim are state actors. The defendants' decision to pursue the Washingtons in state court to recover the unpaid charge account balance does not constitute action taken under color of state law and does not give rise to a cognizable § 1983 claim.

CONCLUSION AND RECOMMENDATION

On the basis of the foregoing, it is the conclusion and recommendation of the undersigned United States Magistrate that all pending motions to dismiss and motions for summary judgment be GRANTED and plaintiffs' complaint be DISMISSED.

Pursuant to § 636(b)(1)(C) of the Federal Magistrate Act, the parties have ten (10) days from service of this Report and Recommendation to file written objections to the proposed findings and recommendations with the district court.

Dated this 14th day of August, 1987.

/s/ GENE B. LEE
Gene B. Lee,
United States Magistrate

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Creditors Service of Michigan City, Indiana
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Michigan City, Indiana 46360

APPENDIX B

(Letterhead Of)

John F. Hoehner
Attorneys at Law
3 Lincolnway
Valparaiso, Indiana 46383

July 13, 1982

Ms. Ava Washington
342 Crestwood Drive
Michigan City, IN 46360

Dear Ms. Washington:

The purpose of this letter is to inform you that I have been appointed Assistant United States Attorney for the Northern District of Indiana and that, therefore, effective July 23, 1982, I will no longer be engaged in the private practice of law.

I would like to transfer your file to my brother, William L. Hoehner, who is currently practicing law in the State of Indiana and who will, for the most part, assume the bulk of my practice. I am certain that Bill will do an excellent job in respect to your concerns and I have fully briefed him reference the status of your case. Indeed, your file has been given to Bill and he currently maintains it at his office located at 63 Franklin Street, Valparaiso, Indiana, 46383.

Of course, you are liberty to take your file to any attorney with whom you might feel more comfortable. In the event transferring your file to my brother is not satisfactory to you, please call him at 219/462-4151 to make convenient arrangements for the release of your file. In the event you do desire to retain Bill as your attorney, please feel

free to call him at any time with any question you may have reference your file.

In closing, please allow me to thank you for the opportunity to render legal services to you. I consider it a privilege to have served you.

Sincerely yours,

/s/ JOHN F. HOEHNER
John F. Hoehner

JFH/ms

APPENDIX C

PLENARY COURT DOCKET,
LAPORTE COUNTY COURT – M.C.

Charge Purchased Goods *Filed* 2-5-80

No. LPC-MC-80-2P-340

Attorneys	Parties
Schaumann & Fenton	Creditors Service Bureau, Assignee Marshall Field & Company, Assignor vs Clyde & Ava Washington

Date	Minutes of Court
2-5-80	Complaint filed in Clerk's office, plenary division. $32.00 filing fee paid. Plaintiff asks judgment for $2,800.14 and costs. Summons issued, to LaPorte County
5-21-80	Def files Answer. Trial set for June 12, 1980 at 10:30 A.M.
6-12-80	Plaintiff in court by Atty Schaumann. Defendant appeared in person. Trial. Witnesses sworn. Evidence had. Finding for Plaintiff in sum of $2785.14 Judgment against defendant in sum of $2785.14 and costs in sum of $32.00
8-7-80	Pd $3.00 Proc Supp in 26993
8-7-80	Comes now plaintiff by counsel and files verified motion for proceedings supplemental to execution. Motion examined and approved. Court now orders defendant to appear in open court on the 27th day of August, 1980 10:30 A.M.

Date	Minutes of Court
10-3-81	Plaintiff files verified motion for proceedings supplemental to execution. Hearing set for the 30 day of December, 1981, at 10:30 a.m.
12-10-81	Mailed proc. supp.
7-1-82	Plaintiff files verified motion on Proceedings supplemental. Hearing on plaintiff's motion set for the 11 day of August, 1982, at 10:30 a.m.
8-11-82	Continued to September 15, 1982 at 10:30 A.M.
9-15-82	Def fails to appear.